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No. 85-5487

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MICHAEL MARNELL SMITH,

Petitioner,

v.

ALLYN R. SIELAFF, Director,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

BRIEF ON BEHALF OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether Petitioner is entitled to have his Fifth Amendment claim considered by federal courts where he failed to raise the claim pursuant to state procedural rules.

2. Whether the Fifth Amendment is implicated when the state introduces testimony of Petitioner's volunteered statement to a private psychiatrist.

3. Whether the Circuit Court applied the holding in *Zant v. Stephens*, 462 U.S. 862 (1983) correctly in affirming Petitioner's sentence of death.

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OPINION BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is reported at 753 F.2d 342 (1985) and is reproduced in the Joint Appendix, pages 160-166.

JURISDICTION

The Petitioner asserts that the jurisdiction of this Court is based upon 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

Michael Marnell Smith was convicted by a jury on November 2, 1977, of the capital murder and rape of Audrey Jean Weiler. The following day, pursuant to the bifurcated trial procedure, the jury heard evidence on the question of penalty and recommended a sentence of death. A post-sentence report was filed and, following another hearing, the trial court affirmed the jury's verdict and entered final judgment on November 30, 1977.

The Supreme Court of Virginia granted Smith an automatic appeal, and after full briefing and argument, affirmed his conviction and sentence of death in a written opinion on October 6, 1978. *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978). This Court denied a petition for a writ of certiorari on May 21, 1979. 441 U.S. 967 (1979).

Smith thereafter filed a petition for a writ of habeas corpus in the state trial court. The state habeas court denied Petitioner's Fifth Amendment claim on the ground it was procedurally barred. An evidentiary

hearing on Petitioner's claim of ineffective assistance of counsel was conducted by the trial court on November 8, 1979, and the trial court issued written findings of fact and conclusions of law denying Smith's petition on March 14, 1980.

The Supreme Court of Virginia denied Smith's appeal on April 24, 1981, and this Court again denied certiorari on December 14, 1981. 454 U.S. 1128 (1981).

Petitioner then filed a petition for a writ of habeas corpus in the United States District Court on June 28, 1982. The petition was referred to a United States Magistrate who issued several reports and recommended the petition be denied. After reviewing Petitioner's objections to the Magistrate's various reports, the District Court entered an order on December 4, 1984, denying the petition. The District Court specifically found that Petitioner's Fifth Amendment claim was procedurally barred.

The United States Court of Appeals for the Fourth Circuit affirmed the district court's denial of habeas corpus in an opinion of May 10, 1985. A petition for rehearing and suggestion for rehearing *en banc* were denied on June 26, 1985, no member of the Court requesting a poll on the suggestion for rehearing *en banc*. This Court granted certiorari on October 21, 1985. *Smith v. Sielaff*, 106 S.Ct. 245 (1985).

STATEMENT OF FACTS[1]

In the early afternoon of May 23, 1977, the Petitioner, Michael Marnell Smith left his home and

[1]Petitioner is not challenging the legality of his conviction. (Br. 3). The facts concerning the offense will be stated briefly to allow the Court to be familiar with the offense.

went for a walk on a beach beside the James River in James City County, Virginia. While walking, Petitioner observed Audrey Jean Weiler, also on the beach. He approached Mrs. Weiler, and after a short conversation, put his arm around her waist and forced her into a wooded area. Petitioner then produced a knife and ordered Mrs. Weiler to disrobe. (J.A. 52,58). Disregarding her pleas to be left alone, Petitioner raped her. Following the rape, Petitioner began to choke Mrs. Weiler with his hands as she begged for her life. (J.A. 58-59). Eventually she went limp, and Petitioner dragged her into the water where he submerged her head. Finally, he stabbed her in the back several times. A subsequent medical examination indicated that death was attributable to three clusters of lethal injuries: asphyxia from strangulation, drowning, and multiple stab wounds. (J.A. 52).

Two days later, police investigators went to the Gospel Spreading Church Farm where Petitioner lived and worked. Upon being advised that he was a suspect, Petitioner confessed to committing the crimes, saying that he had killed Mrs. Weiler because he feared she "could send [him] back [to the penitentiary]". (J.A. 61, 63).

On May 26, 1977, David F. Pugh was appointed to represent Petitioner. During his initial conversation with Petitioner and before any psychiatric examinations, counsel advised Petitioner not to discuss with anyone any offenses that he may have committed that had not been reported. (J.A. 128,129). Mr. Pugh requested a psychiatric examination to determine Petitioner's competency to stand trial. (J.A. 127). That examination was done by Dr. Palmaz, who was of the opinion that Petitioner was competent to stand trial.

Upon Mr. Pugh's request for an additional examination, Petitioner was hospitalized at the Forensic Unit of Central State Hospital from July 5 to August 23, 1977. (J.A. 12, 127). Dr. James C. Dimitris examined Petitioner at that hospital and advised him at the outset that any statements made by him during the course of the psychiatric examination could be used against him at trial. (J.A. 113).

Defense counsel then requested the court to allow Petitioner to be examined by Dr. Wendell Pile, a private psychiatrist chosen by the defense. The trial court granted the motion by order dated September 28, 1977. (J.A. 1-2, 131). During the course of Dr. Pile's examination, Petitioner was asked if he had raped anyone before the present crime. Petitioner replied that his attorney had told him not to discuss any prior criminal activity not related to the present offenses. (J.A. 43, 92). Dr. Pile thereafter never sought any information from Petitioner relating to prior criminal conduct. (J.A. 92). Later in the interview Petitioner voluntarily reported an incident involving an assault many years earlier on a girl on a school bus where he tore her clothing. (J.A. 44, 92).

During the penalty phase of Petitioner's trial, the prosecutor called Dr. Pile to testify concerning the school bus incident. (J.A. 3-6). Petitioner's counsel objected to the introduction of this evidence, but did not raise this issue on appeal to the Supreme Court of Virginia.

SUMMARY OF ARGUMENT

Petitioner's Fifth Amendment claim is not properly before this Court due to procedural default. *Wainwright v. Sykes*, 433 U.S. 72 (1977). Petitioner con-

cedes this claim was not raised pursuant to state procedural rules. The district court refused to consider this claim on the merits due to procedural default, and the Circuit Court did not find this ruling erroneous. The Circuit Court did not decide the merits of Petitioner's claim, and this Court should not reach Petitioner's claim in the interests of comity, federalism and the orderly administration of justice.

The Fifth Amendment is not implicated when a defendant volunteers information to a private psychiatrist from whom he has requested an examination. *Estelle v. Smith*, 451 U.S. 454 (1981). Petitioner was advised of his right to remain silent, and that his statements could be used against him. His volunteered statement to a private psychiatrist was not the result of any compelling influence.

Petitioner has shifted the focus of the claim he presented in the district court so that it is no longer recognizable. He is requesting a new rule with far reaching implications. Since the Circuit Court did not deal with Petitioner's claims, this Court is left without any opinion from the lower court. This Court should not decide issues which were not considered by the Court of Appeals.

The jury in Petitioner's case found the presence beyond a reasonable doubt of two separate and distinct aggravating circumstances. The prosecution introduced the testimony of Petitioner's private psychiatrist during the sentencing phase that Petitioner had committed an assault fifteen years before. This testimony was directed toward the dangerousness aggravating circumstance and did not bear upon the jury's separate finding that the crime was vile. Assuming the psychiatrist's testimony was in-

admissible, the remaining evidence was sufficient to support the finding of dangerousness.

A review of the evidence leads to the conclusion that the jury would not have found the state's case significantly less persuasive had the psychiatrist's testimony been excluded. The questioned testimony was neither misleading nor inaccurate, and the jury's sentence was not based upon an arbitrary factor.

Even if the Court of Appeals did not utilize the harmless error analysis of *Zant v. Stephens*, 462 U.S. 862 (1983), this Court is in the position to do so.

ARGUMENT I

PETITIONER'S CLAIMED VIOLATION OF HIS FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION IS BARRED FROM CONSIDERATION ON FEDERAL HABEAS CORPUS REVIEW UNDER THIS COURT'S DECISION IN *WAINWRIGHT V. SYKES*, 433 U.S. 72 (1977).

During the sentencing phase of Petitioner's capital murder trial, the Commonwealth called Dr. Pile to testify regarding Petitioner's admission that he had assaulted a girl on a school bus. (J.A. 3-6). Counsel objected to the introduction of that testimony, but the trial court permitted it to be presented. Despite his objection at trial, the Petitioner did not assign this issue as error on appeal to the Supreme Court of Virginia.[2]

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[2]Petitioner concedes that this issue was never presented to the Supreme Court of Virginia. (Br. 8). Petitioner notes that this issue was discussed in an *Amicus* brief. The Supreme Court of Virginia was unmistakable in its ruling that it would not consider any arguments by *Amicus* which had not been raised

The Commonwealth of Virginia has a rule requiring counsel to assign the errors upon which reversal is sought in the petition for appeal.[3] Rule 5:21 (now 5:17 and 5:25), *Rules of the Supreme Court of Virginia*, provided, in part:

> Error will not be sustained to any ruling below unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this court to attain the ends of justice. *Only errors assigned in the petition for appeal will be noticed by this court* and no error not so assigned will be admitted as a ground for reversal of a decision below. (Emphasis added).

This Court has established the doctrine that federal courts may not take cognizance of constitutional issues which could have been but were not raised before the state courts when the state procedural bar requires that such matters be raised in order for them to be considered. *Wainwright v. Sykes*, 433 U.S. 72 (1977).[4] The Supreme Court of Virginia's Rule 5:21

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at trial and not addressed by Petitioner on appeal. (J. A. 51 n. 1). An *Amicus* cannot expand the issues or arguments raised by the parties. *United Parcel Service v. Mitchell*, 451 U.S. 56, 60 n. 2 (1981); *Bell v. Wolfish*, 441 U.S. 520, 531 n. 13 (1979); *Knetsch v. United States*, 364 U.S. 361, 370 (1964).

[3]The rules of the Supreme Court of Virginia refusing to reverse a case upon errors not raised in the petition for appeal is similar to this Court's Rule 34(1)(a).

[4]The *Sykes* doctrine is applicable when the state's procedural rule requires an issue to be specifically raised on appeal before it can be considered. *See Cole v. Stevenson*, 620 F.2d 1055 (4th Cir. 1980); *Norris v. Wainwright*, 588 F.2d 130 (5th Cir. 1979); *Forman v. Smith*, 633 F.2d 634, 640 (2nd Cir. 1980), *cert. denied*,

is such a procedural rule. The *Sykes* doctrine arose from the court's concern for comity, federalism and the orderly administration of justice. This Court was of the opinion that federal courts should not be reviewing issues years after the trial when a defendant has failed to follow the state's procedural requirements. *Id.*

The admissibility of Dr. Pile's testimony was not addressed by the Supreme Court of Virginia because it was not assigned as error or briefed by Petitioner.[5] A federal court may not later adjudicate such a constitutional claim unless there was justifiable cause for the default and actual prejudice resulting from it. *Wainwright v. Sykes, supra* at 87. The burden to establish cause and prejudice rests upon the petitioner who alleges it.

During the state habeas hearing, Petitioner's trial attorney was asked why the now asserted Fifth Amendment claim was not raised on appeal in the Supreme Court of Virginia. He responded by saying:

> We had the various objections that we were going to raise to the Supreme Court of Virginia, sort of underlined each objection that we made during the course of the trial, thinking to make that an appealable point, and we didn't find—*we*

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450 U.S. 1001 (1981); *Leroy v. Marshall*, 757 F.2d 94, 95 (6th Cir. 1985); *Holcomb v. Murphy*, 701 F.2d 1307 (10th Cir.), *cert. denied*, 103 S.Ct. 3546 (1983).

[5]Petitioner attempted to raise this Fifth Amendment claim in his state petition for a writ of habeas corpus. The state habeas court refused to consider this claim due to Petitioner's procedural default. (J.A. 153-154). The Supreme Court of Virginia also refused to consider this claim on appeal of the habeas proceeding.

> *didn't think at that time there was any merit to that particular claim.* (J.A. 143). (Emphasis added).

Mr. Pugh further testified that although he did not personally research federal law relating to this issue, research was conducted which might have included federal case law. The results of the research were discussed among counsel, and a deliberate decision was made not to raise this particular issue on appeal. (J.A. 143). This Court has held that appellate counsel should review the record to select the most promising issues for appeal, and it is not expected that every nonfrivolous point will be raised. *Jones v. Barnes*, 463 U.S. 745(1983).

At the time of Petitioner's trial, counsel was aware of controlling authority in Virginia holding that Dr. Pyle's testimony was admissible. *See Gibson v. Commonwealth*, 216 Va. 412, 219 S.E.2d 845 (1975). Thus, counsel had a valid and substantial basis for the belief that the issue would not be successful on appeal. Such reasonably perceived futility cannot satisfy the "cause" prong of the *Wainwright v. Sykes* test. This Court has held that "[s]ince the cause and prejudice standard is more demanding than Fay's deliberate bypass requirement...we are confident that perceived futility alone cannot constitute cause." *Engle v. Isaac*, 456 U.S. 107, 130 n. 36 (1982). The United States District Court found that Petitioner's claim was clearly barred under both this Court's decision in *Sykes*, and the Court of Appeal's decision in *Carrier v. Hutto*, 724 F.2d 396 (4th Cir. 1983), *aff'd en banc*, 754 F.2d 520, *cert. granted, sub nom. Carrier v. Sielaff*, 105 S.Ct. 3523 (1985), because the default resulted not from the trial attorney's ignorance or

inadvertence, but because of a deliberate tactical decision. (J.A. 158). The Court of Appeals never found this ruling to be erroneous.

Nor can Petitioner establish cause for the default through alleging counsel's ineffectiveness. In its decision in this case, the Court of Appeals noted that "[a]t the federal level, the law precluding such testimony on Fifth Amendment grounds, at the time of the trial in November, 1977, was not certain." (J.A. 162). Both the Fifth and Eleventh Circuits have held that the failure of counsel to anticipate *Estelle v. Smith*, 451 U.S. 454 (1981), and timely enter an objection to similar testimony, did not constitute ineffective assistance of counsel. *Gray v. Lucas*, 677 F.2d 1086, 1096 n. 9 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 1099 (1983); *Alvord v. Wainwright*, 725 F.2d 1282 (11th Cir.), *cert. denied*, 105 S.Ct. 355 (1984).

Petitioner's counsel raised seventeen issues on direct appeal and deliberately chose to omit the Fifth Amendment claim now before this Court while pursuing other avenues of defense. The choice was made with a sound underlying tactical basis. As such, counsel's decision should not be the subject of judicial second-guessing. *See Strickland v. Washington*, 466 U.S. ___, 104 S.Ct. 2052 (1984); *Sallie v. North Carolina*, 587 F.2d 636 (4th Cir. 1978). "[T]he Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not ensure that defense counsel will recognize and raise every conceivable constitutional claim."

Engle v. Isaac, supra at 134.

Moreover, the introduction of Dr. Pile's testimony was so insignificant in view of the evidence of ag-

gravation that it was harmless beyond a reasonable doubt (see Argument III *infra*). It logically follows that failure to raise the issue on appeal does not provide the necessary prejudice to satisfy the second prong of the *Sykes* test.

Petitioner suggests that the Court of Appeals in choosing to address the merits of his Fifth Amendment claim, implicitly ruled that Petitioner had demonstrated sufficient "cause" and "prejudice" to satisfy the requirements of *Sykes*. (Br. 9). A reading of the Circuit Court's opinion does not support Petitioner's assertion. The Circuit Court never addressed the Fifth Amendment claim and simply chose not to reach the state's claim of procedural default since in the Court's opinion the Petitioner was not entitled to relief. (J.A. 163). The Circuit Court specifically noted that there existed a question whether the representation of trial counsel was, in fact, ineffective or that any prejudice resulted from not having raised this claim on appeal. (J.A. 163). The Court also observed that it was questionable whether counsel for Petitioner could establish that trial counsel's failure to object constituted inexcusable neglect. (J.A. 162). Such statements by the Circuit Court refute Petitioner's assertion that the court assumed sufficient "cause" and "prejudice" to satisfy *Sykes*, or that Dr. Pile's testimony tainted the jury's finding of future dangerousness.

Failure to recognize the procedural bar to consideration of this claim established by the holding in *Wainwright v. Sykes* would seriously damage the principles of comity, federalism and finality upon which that decision was based. The rule is firm and has been applied by this Court in other cases where constitutional claims were defaulted in state court. *See*

e.g. Engle v. Isaac, supra. Absent a showing by Petitioner of cause and prejudice, this claim should not now be considered. Petitioner has failed to establish either cause or prejudice and is thereby barred from having his claim adjudicated in the federal courts. The Court of Appeals for the Fourth Circuit should have found that Smith's Fifth Amendment claim was barred by procedural default. Under the clear pronouncement in *Wainwright v. Sykes, supra,* this Court should dismiss Petitioner's claim.

ARGUMENT II

THE EVIDENCE PRESENTED BY DR. PILE WAS ADMISSIBLE AND DID NOT VIOLATE PETITIONER'S FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION.

Following Petitioner's arrest, he was examined for competency by Dr. Palmaz. Prior to any psychiatric examinations, counsel advised Petitioner not to discuss prior offenses with anyone. (J.A. 128,129). On request of the defense, further examination was performed by Dr. James C. Dimitris at Central State Hospital. (J.A. 127, 42) During the examination conducted by Dr. Dimitris, Petitioner was advised that he could say whatever he wanted as long as he understood his statements would be a part of record and the record will be used one day against him in a court of law. (J.A. 113) Following Dr. Dimitris' examination, defense counsel requested still more testing by a psychiatrist of his own choosing, Dr. Wendell J. Pile. The court granted that request and entered an order permitting payment of Dr. Pile from state funds. (J.A. 1-2) Prior to Dr. Pile's examination, counsel once again advised Petitioner not to discuss

prior offenses with anyone. (J.A. 133). During Dr. Pile's examination of Petitioner, the doctor asked if Petitioner had ever raped anyone before to which Petitioner replied that his counsel had told him not to discuss prior offenses. (J.A. 43) Notwithstanding his understanding of his counsel's advice, Petitioner later volunteered the information concerning the school bus incident. This information was not given in response to a question from Dr. Pile but was made gratuitously by Petitioner. (J.A. 92) Moreover, defense counsel testified at the state habeas hearing that in view of the repeated advice Petitioner had been given about not discussing prior offenses with anyone, counsel believed Petitioner would heed that advice. (J.A. 129-130, 132-133)

It is clear that Petitioner was well aware of his constitutional right against self-incrimination. It is equally clear that he was aware that any statement made to Dr. Pile could be used against him at his subsequent trial. Petitioner had been adequately warned by both his attorney and Dr. Dimitris. On this evidence the state habeas judge found:

> Thus, the Court finds that petitioner was carefully advised by his attorney not to discuss the offense with anyone and also not to divulge anything about prior offenses, that petitioner was fully aware of this advice when he was examined by Dr. Pile and exhibited such knowledge when he advised Dr. Pile that his attorney had told him not to discuss any past offenses, and that petitioner voluntarily waived his right against self-incrimination. (J.A. 145)[6]

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[6]Although Petitioner was present at the state plenary hearing

In *Estelle v. Smith*, 451 U.S. 454 (1981), this Court recognized that an evaluation of a criminal defendant by a psychiatrist implicated both the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to counsel.[7] This Court was concerned with the introduction of a court-appointed psychiatrist's testimony to prove a capital defendant's future dangerousness, based on information gleaned from a custodial examination of the accused who had neither requested the examination nor introduced psychiatric evidence on the issue. Moreover, he had not been warned of his right to remain silent and that any statement he made could be used against him at sentencing. In view of these critical facts, this Court held that introduction of the evidence violated the accused's Fifth Amendment rights. The instant case is clearly distinguishable. The record plainly shows that the examination was requested by and for the defense, and Dr. Pile was chosen not by the state or the court but by defense counsel.[8] Significantly, Petitioner had repeatedly been warned of his rights prior to volunteering this information to his psychiatrist.[9]

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he chose not to testify. Therefore the evidence as to the warnings he received stands uncontradicted.

[7]In this case the Sixth Amendment concerns expressed by this Court in *Estelle v. Smith* are not present. Petitioner not only had counsel but it was Petitioner's counsel who advised that Petitioner be examined by Dr. Pile.

[8]Petitioner was the moving party for this examination, but since he was indigent, the trial court entered an order to allow payment to Dr. Pile. Such a circumstance cannot be construed to change this private psychiatric examination into a court-ordered examination referred to in *Estelle v. Smith*.

[9]Petitioner argues that he can prevail even if this Court were

Under circumstances strikingly similar to those present in this case, the court in *Smith v. Wainwright*, 741 F.2d 1248 (11th Cir. 1984), held that no Fifth Amendment claim existed. In that case, the defendant took the stand in his own defense and testified that he was home sleeping off a drunk at the time of the murder. The state called Dr. Niswonger, a psychiatrist who had examined the defendant before trial. Dr. Niswonger testified that during the examination the defendant had claimed amnesia concerning the events of the murder. The state then argued to the jury that the doctor's testimony contradicted the defendant's alibi that he was home during the murder. The defendant contended that under *Estelle v. Smith, supra*, Dr. Niswonger's testimony was inadmissible. In rejecting that argument the Court of Appeals for the Eleventh Circuit stated:

> The record in this case shows that the trial court did not appoint Niswonger to examine Smith, as was the case in *Estelle v. Smith*. On the contrary, Smith retained Niswonger (through

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to hold that a defendant who requests a pretrial mental evaluation waives his privilege against self-incrimination by speaking to the examiner. His thesis is that *Estelle v. Smith* requires the examiner to give proper warnings, and since Dr. Pile gave no warnings, his testimony was inadmissible. (Br. 22 n. 14). This Court's decision in *Estelle v. Smith* did not turn on the fact that the examiner did not give the defendant warnings. The decision rested upon the fact that the defendant received no warnings. In this case Petitioner was warned repeatedly by his attorney not to discuss prior criminal conduct with anyone. The warning from one's attorney would be expected to have more force than a similar warning from an examiner. It was the absence of warnings, not who gave the warnings, which was the crux of *Estelle v. Smith*.

> his trial counsel) to conduct an examination regarding a possible claim of insanity. In such a case, *Estelle v. Smith* does not require that the psychiatrist give *Miranda* warnings. The protections of *Estelle* do not apply unless the psychiatrist is 'essentially . . . an agent of the state. . . .' 451 U.S. at 467.

741 F.2d at 1258, 1259.

Furthermore, in *Estelle v. Smith*, this Court reaffirmed that ". . . *volunteered* statements . . . are not barred by the Fifth Amendment." 451 U.S. at 469. (Emphasis added.) In this case, the state habeas court has found, upon the evidence, that Petitioner had been carefully advised by his attorney not to discuss with anyone any prior offenses and that Petitioner clearly understood that warning. Notwithstanding his attorney's advice, Smith voluntarily told Dr. Pile about the bus incident.

Under the facts of this case, Petitioner's revelation about the bus incident was given freely and voluntarily without any compelling influence to a private psychiatrist who was not an agent of the state.[10] Under such circumstances, Dr. Pile's testimony was admissible and Petitioner's Fifth Amendment rights were not violated.

In his brief Petitioner is urging this Court to limit the decision in *Estelle v. Smith* to pretrial mental examinations requested by the prosecution and to develop a new body of law relating to such examinations requested by the defendant. This shift in Petitioner's

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[10]There exists no physician-patient privilege in a criminal prosecution in Virginia. *See Gibson v. Commonwealth, supra.*

position is so extreme as to leave the claim presented in his federal petition for a writ of habeas corpus unrecognizable. The entire thrust of Petitioner's claim in his petition was that Dr. Pile's testimony was inadmissible since Petitioner had not been warned about the consequences of his statements. (J.A. 150-152).

Neither the district court nor the Court of Appeals addressed the issue which Petitioner is presenting to this Court. This Court should refrain from deciding this issue which will obviously have far reaching implications when the record has not been developed in the courts below. Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them. *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1969). Since the Court of Appeals did not decide the issue Petitioner is pursuing before this Court, the Court is left without a lower court opinion on the legal issue. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 163 (1975).

Many questions remain unanswered concerning the position Petitioner is espousing.[11] What role does the Fifth and Sixth Amendments play when the state plans to use the results of a pretrial evaluation on issues other than the defendant's future dangerousness? *See* Slobogin, "Estelle v. Smith: The Constitutional Contours of the Forensic Evaluation," 31

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[11]Some of the cases upon which Petitioner relies do not support his position. *See* e.g. *Battie v. Estelle*, 655 F.2d 692 (5th Cir. 1981), where the Circuit Court would not obviate the necessity for giving the *Miranda* warnings when the defense requested the examination. Also the court in *United States v. Castenada*, 557 F.2d 605 (7th Cir. 1977), allowed the government to use the testimony of a mental health expert to impeach the defendant's testimony.

Emory L.J. 71, 76 (1982). What if a defendant tells the examiner that he has amnesia concerning the events surrounding the crime, but later testifies that he was at home sleeping off a drunk? Can the prosecution call the mental health expert to impeach the defendant's alibi testimony?[12] *See Smith v. Wainwright, supra.* Suppose a defendant seeks an examination to determine the question of sanity at the time of the offense for which he stands charged, and during the examination gratuitously confesses to the commission of a totally unrelated crime? Can the prosecution call the mental health expert to testify to the defendant's confession? Suppose a defendant consults a mental health expert who renders a discouraging opinion based upon the defendant's description of the events surrounding the crime? The defendant then seeks another evaluation and dramatically changes his version of the events. Can the prosecution call the first mental health expert?[13]

A myriad of possibilities can arise with Petitioner's proposed position about which this Court can only speculate. The record in this case leaves the Court unenlightened as to the many implications which would follow the adoption of Petitioner's proposed position. This Court should not attempt to resolve important constitutional issues when the Petitioner

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[12]Petitioner suggests that it might be permissible to use statements of the defendant to a mental health expert to impeach the defendant's testimony if he chooses to testify. (Br. 29 n. 19). Petitioner does not explain, however, when and under what conditions the prosecution would be entitled to this information.

[13]*See* Saltzburg, "Privileges and Professionals: Lawyers and Psychiatrists", 66 Va. L. Rev. 597, 629-30 (1980).

has failed to raise the issue below in a manner in which the lower courts can adequately explore the implications of a new rule.[14]

ARGUMENT III

THE TESTIMONY OF DR. PILE WAS INSIGNIFICANT AND DID NOT INFLUENCE THE JURY'S DECISION TO IMPOSE THE DEATH SENTENCE.

Dr. Pile's testimony concerning Petitioner's aborted assault on the girl on the school bus is insignificant when viewed with the other uncontested evidence which was before the jury on the issue of dangerousness.

The Commonwealth introduced evidence that Petitioner had previously been convicted of rape in 1973. The evidence further established that Petitioner had been paroled from the penitentiary on that charge less than four months prior to the rape and murder of Mrs. Weiler. Also before the jury was Petitioner's confession which contained the statement that he killed Mrs. Weiler because he was afraid she "could send [him] back [to the penitentiary]." (J.A. p. 52). Also of importance is the fact that the jury was aware of the heinous nature of the offense itself.[15] Under Virginia law the dangerousness aggravating circumstance can be proven by reference to the circumstances surrounding the commission of the crime. *See* § 19.2-264.4C, Code of Virginia. In *Quintana v. Com-*

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[14]Respondent respectfully suggests that the writ be dismissed as improvidently granted.

[15]The jury was instructed to consider the circumstances surrounding the offense when determining the punishment to be imposed. (J.A. 40).

monwealth, 224 Va. 127, 295 S.E.2d 127 (1982), *cert. denied*, 460 U.S. ___ (1983), the Court said:

> As to the factor that defendant will pose a continuing serious threat to society, we need only refer again to the heinous circumstances surrounding this homicide, committed upon a seventy-two year old woman during the course of robbery. The jury and trial court could properly conclude that if defendant has killed once under these circumstances for the mere purpose of obtaining a sum of money, he is likely to kill again, whether incarcerated or not, for an equally devious purpose.

224 Va. at 151.

A review of closing arguments in the sentencing phase of Petitioner's trial indicates that the school bus assault was only incidental to the prosecution's argument for the death penalty. There were only three passing references to that event in some fourteen pages of argument. (J.A. 30-38).

This Court has recognized that the admission into evidence of a defendant's confession in violation of the Fifth Amendment can be harmless. In *Milton v. Wainwright*, 407 U.S. 371 (1972), this Court held that assuming *arguendo* an involuntary confession was admitted into evidence, such admission was harmless beyond a reasonable doubt, as the jury had before it overwhelming evidence of the defendant's guilt. In so holding, the Court made a cogent observation:

> The writ of habeas corpus has limited scope; the federal courts do not sit to retry state cases de novo but, rather, to review for violation of federal constitutional standards. In that process

> we do not close our eyes to the reality of overwhelming evidence of guilt fairly established in the state court years go by use of evidence not challenged here; the use of the additional evidence challenged in this proceeding and arguably open to challenge was, beyond reasonable doubt, harmless.

407 U.S. at 377, 378.

Similarly, in *Brown v. United States*, 411 U.S. 223 (1973), this Court held as harmless the erroneous admission of a co-defendant's extrajudicial confession implicating the defendant in violation of *Bruton v. United States*, 391 U.S. 123 (1968). The Court, upon an independent examination of the record, concluded that the testimony improperly admitted was merely cumulative of other overwhelming and largely uncontroverted evidence which had been correctly admitted.

Examining the present case in light of the opinions of this Court in *Milton* and *Brown*, it is clear that Dr. Pile's testimony was merely cumulative of the other overwhelming and uncontested evidence properly before the jury. In view of the nature and quantum of the evidence of dangerousness, one can only conclude that the jury would have found the "dangerousness" aggravating circumstance even had Dr. Pile not testified concerning the bus incident.

Moreover, when reviewing alleged error to determine whether there was harm or prejudice, the nature of the evidence itself and of the proceeding in which it is introduced is relevant. There is no argument that the evidence of the school bus incident would not have been admissible had it been presented from some other source such as the victim herself. Thus, the

Commonwealth could present the exact evidence on a resentencing procedure that was presented in the original trial. Accordingly, Petitioner has suffered no prejudice.

It is true, as Petitioner says, that a sentencing procedure is a functional equivalent of a guilt trial, at least so far as the protection of the Fifth Amendment privilege is concerned. *Estelle v. Smith, supra* at 369. However, for the purposes of harmless error analysis, it is important to realize that there is a competing interest of having the jury be aware of a broad range of information and all materials which are relevant to the various predicates upon which the death penalty may be imposed. *Gregg v. Georgia* 428 U.S. 153 (1976). If, as Petitioner argues, the information on the school bus incident was significant, it thus becomes the sort of information which this Court has said should be available to the jury imposing sentence.

Finally, if the jury did take note of the information, it is arguable that it was viewed in a light favorable to Smith. Dr. Pile testified that Smith did not rape the girl because he thought better of it. (J.A. 6). Such testimony indicates the presence of conscience and possible amenability to rehabilitation. Accordingly, it cannot be said with any certainty that the effect of the testimony was entirely negative.

Referring to the application of the harmless-error rule this Court has observed:

> Judicious application of the harmless-error rule does not require that we indulge assumptions of irrational jury behavior when a perfectly rational explanation for the jury's verdict, completely con-

> sistent with the judge's instructions, stares us in the face.

Schneble v. Florida, 405 U.S. 427, 432 (1972).

When the uncontested evidence of future dangerousness is reviewed it leads to the conclusion that the minds of a jury would not have found the state's case significantly less persuasive had the testimony of Dr. Pile been excluded. *Id.* The admission of Dr. Pile's testimony, therefore, was at most harmless error.

ARGUMENT IV

THIS COURT'S HOLDING IN *ZANT V. STEPHENS*, 462 U.S. 862 (1983) WAS CORRECTLY APPLIED BY THE FOURTH CIRCUIT COURT OF APPEALS AND AFFIRMANCE OF THE DEATH PENALTY IS PROPER DESPITE THE ALLEGED ERROR RESULTING FROM THE TESTIMONY PRESENTED BY DR. PILE.

In *Zant v. Stephens* this Court said:

> [A] death penalty supported by at least one valid aggravating circumstance need not be set aside...simply because another aggravating circumstance is 'invalid' in the sense that it is insufficient itself to support the death penalty.

462 U.S. at 884. Citing this language, the court below refused to grant Petitioner habeas corpus relief. (J.A. 163-166).

The jury's verdict recommending a death sentence in this case was supported by two separate and distinct grounds of aggravation - 1) dangerousness and 2) vileness. (J.A. p. 163). The Court of Appeals correctly noted that the challenged testimony of Dr. Pile

was directed to the question of "dangerousness." The Court of Appeals also found there was ample unchallenged testimony supporting the jury's finding of the "vileness" basis for the death penalty. (J.A. 164).

Petitioner argues that because the evidence forming the basis for the "dangerousness" finding was constitutionally inadmissible (Dr. Pile's testimony), the *Zant v. Stephens* rule does not apply. At the outset, it is urged that this argument fails for want of proof of the predicate. Contrary to Petitioner's premise, for the reasons discussed in Argument II, *supra*, Dr. Pile's testimony was admissible; therefore, there is no need to view this case in light of *Zant v. Stephens*. However, assuming the evidence was inadmissible for the purposes of this argument, the court below reached the correct result under *Zant v. Stephens*.

In *Zant v. Stephens*, the jury found three aggravating factors upon which the defendant was sentenced to death. Subsequently, one of those aggravating circumstances—"a substantial history of serious assaultive criminal convictions"—was determined to be invalid because it was unconstitutionally vague. Nevertheless, the Georgia Supreme Court concluded that the remaining two aggravating circumstances adequately supported Stephens' sentence of death.

In its analysis, this Court focused upon the reason the aggravating circumstance had been found to be invalid by the Georgia Supreme Court. In doing so, this Court dismissed Stephens' contention that that the rule of *Stromberg v. California*, 283 U.S. 359 (1931), required vacation of the death sentence. The first rule of *Stromberg* is applicable only when a general verdict is returned. Because the jury in *Zant v.*

Stephens expressly found the various aggravating circumstances, the first *Stromberg* rule was not controlling. Likewise, in the case at bar, the jury returned specific findings of aggravating circumstances.

The second rule derived from the *Stromberg* case involves a situation when an aggravating circumstance has been found invalid for an impermissible reason, such as treating constitutionally protected conduct as an aggravating factor. Such a situation is not present in the case at bar; accordingly, the second *Stromberg* rule is also not controlling. Thus, the basis for the alleged invalidity of the "dangerousness" finding is not one which the *Zant v. Stephens* Court implied would require vacation of the death sentence.

When responding to this Court's certified question, the Georgia Supreme Court observed "a different result *might* be reached in a case where evidence was submitted in support of a statutory aggravating circumstance which was *not otherwise admissible, and thereafter the circumstance failed.*" 462 U.S. at 890. (Emphasis added). It is to this issue that the Court is called upon to focus. The proposition of the Georgia Supreme Court coupled inadmissible evidence with the failure of the aggravating circumstance. Assuming for the sake of argument that Dr. Pile's testimony was inadmissible, the "dangerousness" aggravating circumstance would not fail even if the testimony relating to the school bus incident is discarded. The jury had before it evidence that Petitioner had previously been convicted of rape in 1973, and he had been paroled less than four months prior to committing this vicious rape and murder. The jury also was aware of Petitioner's confession which contained the statement that he had killed Mrs. Weiler because he

feared being returned to the penitentiary. (J.A. 31, 37, 52, 63). The clear implication was that Petitioner would kill again whenever necessary to avoid being returned to the penitentiary. It requires an unreasonable view of the evidence to conclude that the jury would not have found the "dangerousness" aggravating circumstance but for the presence of the testimony about the earlier attack. This is particularly true in view of the fact that the school bus assault had occurred some fifteen years prior to the murder of Mrs. Weiler when Petitioner was about fifteen years of age. (J.A. 33, 35). Furthermore, the victim of the bus incident had neither been raped nor physically injured. Compared to the overwhelming evidence of Petitioner's recent viciousness and brutality, the bus incident pales into relative insignificance.

The nature of Dr. Pile's testimony should also be taken into consideration. His testimony was not inherently inadmissible. The inadmissibility arises not from the substance of the testimony, but merely from who related the incident. The identical evidence could have been presented by either the victim of the bus incident or by someone else to whom the Petitioner had admitted the incident. Information regarding a defendant's background is a legitimate area of inquiry during capital sentencing, and as such, testimony about the bus incident would not have injected any arbitrary factor into the sentencing procedure.

Of greater importance, the testimony concerning the bus incident did not inject into the sentencing calculus materially inaccurate or misleading information. *See Zant*, 462 U.S. at 887 n. 24. When an aggravating circumstance rests upon materially in-

accurate or misleading information, the accuracy of a death sentence is called into question.[16]

In *Zant*, this Court employed essentially a federal harmless error analysis. *Barclay v. Florida*, 463 U.S. 939, 951 n. 8 (1983). Thus, when a defendant challenges a death sentence, "the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland v. Washington*, 104 S.Ct. 2052, 2069 (1984).[17]

In its opinion the Circuit Court did not specifically refer to harmless error, but the Circuit Court did indicate that it doubted that any prejudice resulted from the admission of the testimony concerning the

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[16]An example of such a situation is found in *Evans v. Commonwealth*, 228 Va. 468, 323 S.E.2d 114 (1984). Evans had been convicted and sentenced to death. His conviction and sentence had been affirmed by the Virginia Supreme Court and certiorari had been denied by this Court. During state habeas corpus proceedings it became apparent that many of the records of convictions presented to the jury had been seriously misleading or otherwise defective. Accordingly, the Commonwealth confessed error and acknowledged that Evans' death sentence should be vacated.

[17]Petitioner's suggestion that the harmlessness of constitutional error at a capital sentencing should be determined solely by asking whether the evidence might have contributed to the jury's decision, (Br. 34), would present an unworkable standard. Any inadmissible evidence "might . . . [contribute] to the jury's decision." To adopt such a standard of harmless error would require not just a fair trial but one which is perfect.

bus incident.[18] It can be safely assumed that had the Circuit Court been of the opinion that this testimony had tipped the scales in favor of the death sentence it would not have affirmed the sentence.

Even if the Circuit Court did not apply the harmless error test, this Court stands in the position to do so. There exists in the record no disagreement over the facts, and this Court must determine on the basis of "[its] own reading of the record and on what seems to [it] to have been the probable impact...on the minds of the jury," *Harrington v. California*, 395 U.S. 250, 288 (1969), whether Dr. Pile's testimony was sufficiently prejudicial as to require reversal.

This Court's decision in *Zant* was premised in part upon the appellate review provided by the Georgia Supreme Court. This Court said:

> Our decision in this case depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality.

462 U.S. at 890.

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[18]The Circuit Court's comment came in the context of its discussion of whether trial counsel had been ineffective in not appealing the Fifth Amendment claim. To establish ineffectiveness of counsel a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland v. Washington, supra.* It follows then that the Circuit Court was of the opinion that the jury's sentencing decision would have not been different even if it were error to have admitted Dr. Pile's testimony.

The Virginia capital sentencing procedure also provides this procedural safeguard. The Supreme Court of Virginia is mandated to review each sentence of death to determine whether such sentence was imposed by any arbitrary factor and whether it was excessive or disproportionate. Section 17-110.1 Code of Virginia. In conducting its review the Supreme Court of Virginia did not consider Dr. Pile's testimony relating the bus incident. (J.A. 74).[19] This is a clear implication that this testimony was considered insignificant. Recognizing that Petitioner's case was the first to be reviewed under the new law, the Supreme Court of Virginia found that the death sentence was

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[19]Petitioner argues that this Court must assume that Petitioner's sentence was based, to a determinative degree, on the finding of dangerousness which was influenced by Dr. Pile's testimony. (Br. 36-37). Petitioner attempts to support this assumption by claiming that trial counsel blundered into eliciting Dr. Pile's diagnosis. (Br. 34). The state habeas court found that trial counsel's examination of Dr. Pile was in an effort to establish that Petitioner was suffering from a mental illness which could be treated. The court concluded that due to the overwhelming aggravating facts the only reasonable defense was to attempt to establish the statutory mitigating factor of extreme mental or emotional disturbance. (Opinion of Judge Carneal dated March 14, 1980 at 7-8). The district court credited these findings and concluded counsel was not ineffective in his examination of Dr. Pile. (Magistrate's Second Preliminary Report dated March 30, 1984, at 20-21). Petitioner raised this issue as Question 3 in his Petition for Writ of Certiorari. In this Court's grant of certiorari the Court limited the grant to Questions 1 and 2. Accordingly, the actions of trial counsel are not properly before this Court. Furt[illegible]r, the fact that the Supreme Court of Virginia did not consider Dr. Pile's testimony in reviewing Petitioner's case demonstrates that this testimony did not influence the finding of dangerousness.

not excessive for cases involving murder in connection with rape. (J.A. 76).

The evidence in aggravation has previously been detailed in Argument III, *supra*, and need not be reviewed further. The evidence of aggravation was overwhelming, and there is no reasonable probability that the testimony concerning the bus incident would have altered the jury's conclusion that a sentence of death was appropriate.

Other courts have been confronted with similar claims that a death sentence should be set aside because inadmissible evidence was admitted during the sentencing hearing. In disposing of these claims the courts have applied a harmless error review. *Skillern v. Estelle*, 720 F.2d 839 (5th Cir.), *cert. denied*, ___ U.S. ___, 105 S.Ct. 224 (1983), presents a situation closely analogous to the facts in Petitioner's case. During the sentencing phase of a capital murder trial, the prosecution introduced evidence from a forensic pathologist that there was a probability the defendant would commit acts of violence in the future and constitute a continuing threat to society. The Texas Court of Criminal Appeals found this evidence to have been inadmissible because the doctor was incompetent to testify as an expert and lacked first-hand familiarity with the defendant's personality to testify as a lay witness. However, the Texas Court found the admission of this evidence was harmless because there was ample other evidence of Skillern's violent propensities. The Court of Appeals for the Fifth Circuit concluded that federal habeas relief was not justified because the admission of the prejudicial testimony was not "material in the sense of a crucial, critical, highly significant factor." 720 F.2d at 852.

The defendant in *State v. Campbell*, 664 S.W.2d 281 (Tenn. 1984), was sentenced to death upon conviction of murder during a robbery. The jury found three aggravating circumstances, one being that the defendant had previously been convicted of one or more felonies other than the current charge which involved the use or threat of violence to the person. On appeal, the Tennessee Supreme Court found that the state's introduction of convictions for grand larceny and burglary were inadmissible because they were not related to the use or threat of violence to the person. Nevertheless, that Court found the remaining evidence sufficient to support the aggravating circumstance. The court was convinced beyond a reasonable doubt the admission of this evidence was harmless. Further, the court found the evidence of the other aggravating circumstances overwhelming and in no way depended on proof of the convictions of the nonviolence felonies.

In the final analysis, it is perhaps most significant to note that Petitioner has utterly failed to demonstrate that the allegedly inadmissible testimony of Dr. Pile in any way tainted the other, independent aggravating circumstance—"vileness". The finding of this circumstance alone would justify the jury's sentence. Since Petitioner's death sentence is supported by at least one valid unchallenged aggravating circumstance, the Court of Appeals correctly applied *Zant* in affirming Petitioner's sentence of death.

CONCLUSION

This Court should hold that Petitioner is procedurally barred from having his Fifth Amendment claim considered by federal courts. Petitioner did not raise

this issue pursuant to state procedural rules, and has deprived the state of the opportunity to rule upon his claim. It has now been seven years since Petitioner's trial and appeal. If citizens are ever to expect some semblance of finality in criminal cases, this Court should enforce its holding in *Wainwright v. Sykes.*

This Court should not use this case as a vehicle to consider Petitioner's request for a new rule on pre-trial psychiatric examinations. The implications of any such decision can only be left to speculation as the lower courts did not address the merits of Petitioner's recently created proposal.

The evidence of Dr. Pile did not violate Petitioner's privilege against self incrimination. Even if this testimony is found to have been inadmissible, it was so inconsequential when compared to the unchallenged evidence as to be harmless beyond a reasonable doubt.

The Commonwealth respectfully submits that this Court should affirm the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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